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## Articles

### Belief and Beyond: The Law, the Nation, and the Drama in Joanna Baillie's *Witchcraft*

Alyson Bardsley\*

Against a background of three stakes set for burning, the strangled corpse of a young woman is brought downstage in the last scene of Joanna Baillie's *Witchcraft* (1836). Is she a victim of witchcraft? A witch herself? As I will show, the enigma of this corpse exemplifies the unpredictable dialectical relationship between evidence and belief that is both Baillie's topic and the basis for her dramatic technique. Her play interestingly juxtaposes the problem of belief in witches with problems in the history of criminal evidence—historically related phenomena in Baillie's native Scotland—while also entertaining questions regarding what a play's audience can be brought to believe.

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The term “witch-hunt” has become a synonym for an investigation gone wrong, through procedures contaminated by the investigators’ beliefs, needs, and desires. Baillie approaches the topic from a different angle, publishing her play almost exactly one hundred years after the repeal of the witchcraft statute in Britain.<sup>1</sup> For a writer in her position, witchcraft connotes a superseded and possibly shameful past, rendered even more distant by a period of intense penal reform, in which early nineteenth-century legislators and members of the judiciary, prompted in part by developments in late-Enlightenment philosophy, instituted new standards of proof and regularized procedure.<sup>2</sup> However, if witch prosecutions are marked as primitive, they are also important precursors of the institutional and philosophical developments leading to legal reform. Furthermore, issues related to Scottish national identity greatly complicate the evaluation and representation of Scotland’s past in Baillie’s play—especially as those issues relate to developments in Scotland and England’s relationship in the period between *Witchcraft*’s late-seventeenth-century setting and the play’s 1836 publication.

Born in Scotland near Glasgow, Baillie (1762-1851) became a life-long resident of England from the age of seventeen, when she moved to a London suburb along with her brother Matthew, one of the Prince Regent’s physicians. Baillie thus had particular insight into the cultural relationships and differences between the two countries. Baillie’s dramatic writing began with the three-volume *Series of Plays: In Which It Is Attempted To Delineate the Stronger Passions of the Mind*. The first volume appeared anonymously in 1789, to great fanfare; it included several plays and an *Introductory Discourse* that clearly reflects the influence of Scottish Enlightenment philosophy and psychology.<sup>3</sup> In her time Baillie was widely regarded

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1. For the repeal, see An Act to Repeal the Statute Made in the First Year of the Reign of King James the First, Intituled, An Act Against Conjuracion, Witchcraft, and Dealing with Evil and Wicked Spirits, 9 Geo. 2 ch. 5 (1736).

2. For an overview of these developments, see LINDSAY FARMER, CRIMINAL LAW, TRADITION, AND LEGAL ORDER: CRIME AND THE GENIUS OF SCOTS LAW, 1747 TO THE PRESENT (1997); 5 DAVID M. WALKER, A LEGAL HISTORY OF SCOTLAND (1996).

3. Margaret Carhart’s monograph, which remains the only extended discussion of Baillie’s life, is particularly inadequate regarding her intellectual influences: Carhart takes Baillie at her word that she is “unlearned,” and expresses surprise at her familiarity with Dugald Stewart, one of the foremost popularizers of Scottish Enlightenment thought in the late eighteenth and early nineteenth centuries. See MARGARET CARHART, THE LIFE AND WORK OF JOANNA BAILLIE 53 (1923) (citing JOANNA BAILLIE, DRAMATIC AND POETICAL WORKS 509 (London, Longman, Brown, Green, and Longmans 1851)). Many critics now take Baillie’s wide reading and her disavowal of it for granted. On Baillie’s use of Scottish Enlightenment philosophy and psychology, see ANNE K. MELLOR, MOTHERS OF THE NATION: WOMEN’S POLITICAL WRITING IN ENGLAND, 1780-1830, at 40 (2000). For one instance of Baillie’s disingenuity about her reading, see *infra* note 58.

as “[t]he foremost female writer of her age.”<sup>4</sup> The volume of new dramas that includes *Witchcraft*, published in 1836, was her last published dramatic work until the issue of her collected works in 1851; it appeared to enthusiastic critical response.<sup>5</sup> Thus, *Witchcraft* appeared toward the end of Baillie’s distinguished career as a dramatist. Furthermore, the play demonstrates a critical awareness of the complex and vexed links between her two countries, by means of both material connections and reciprocal influences—an awareness that informs Baillie’s investigation into whether and how legal change has represented progress.

Baillie’s play presents a narrative of apparent cultural development in which religious fanaticism, folk knowledge, and local values give way to enlightened reason, higher proof standards, and national policies. Even as it delineates this narrative, however, the play persistently questions it. Its focus on crime reflects contemporary debate about legal reforms, specifically in terms of law’s relation to customary beliefs, values, and behavior. For example, dueling, which is crucial to the play’s back-story, involves changing attitudes toward aristocratic mores and practices. In the aftermath of a duel that precedes the play, the victor, dogged by problems of mistaken identity and missing witnesses, is perceived first as a murderer and then, after his supposed death, as a demonic figure. His daughter, consequently, is accused of witchcraft, and those accusations are then taken up and used by her romantic rival. In its turn, witchcraft is inextricably involved with beliefs, informed by religion and folk tradition, about the natural and supernatural world—beliefs that are also subject to ongoing and contested revision. In part because we see a shift in the criminal status of both dueling and witchcraft as the play registers the changing beliefs and practices of the characters who would prosecute them, *Witchcraft* draws attention to the various gaps between the law and its enforcement. The challenge that both crimes pose, and that makes drama an especially suitable medium for contemplating them, involves the nature of evidence and evidence-gathering. Since drama famously depends upon the “suspension of disbelief,” it lends itself well to questions of what leads to belief in the first place. While it is often asked how the study of literature can add to the un-

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4. Adrienne Scullion, *Some Women of the Nineteenth-Century Scottish Theatre: Joanna Baillie, Frances Wright and Helen MacGregor*, in *A HISTORY OF SCOTTISH WOMEN’S WRITING* 158, 165 (Douglas Gifford & Dorothy Macmillan eds., 1997). Scullion also quotes an 1815 letter from Byron to Thomas Moore, calling Baillie “our only dramatist since Otway and Southerne.” *Id.* at 166.

5. Carhart asserts without further details that most of the plays published in 1836 had been composed for some time. See CARHART, *supra* note 3, at 53. Carhart collects the uniformly enthusiastic critical response, though none of the commentators refers to *Witchcraft* by name. See *id.* at 54-57.

derstanding of law, Baillie's play, for reasons linked to her historical and political position, is equally engaged with how legal categories and practices illuminate the workings of literature—in this case specifically theatrical literature.

In what follows, I will set out some political and social dimensions of Scotland and England's changing relationship in the eighteenth and early nineteenth centuries in order to explain how legal institutions attain a peculiar importance during that period. While explaining the appeal of witchcraft as a topic, I will show how Baillie bases her play on historical and legal sources, which, in turn, highlight the significance of witchcraft in British legal history and Scotland's part in it. I will go on to show how Baillie uses witchcraft and witch-belief to reflect contemporary developments regarding evidence, kinds of certainty, and acceptable degrees of doubt. Finally, I will discuss Baillie's implied contention that drama is particularly suited to investigating these problems of knowledge.

#### SETTING THE LEGAL AND HISTORICAL STAGE

Baillie's play was published near the end of an era of disputes about legal reform in a new, nominally unified Britain. The Treaty of Union of 1707<sup>6</sup> had abolished the Scottish Parliament and moved the power of legislation to London—a circumstance that complicated the question of whether and how Scotland's legal institutions could adapt to the rapid socioeconomic changes taking place throughout the eighteenth century. In Scotland—a nation but no longer a nation-state—discussions of legal change thus had a different valence and involved different stakes than did the same debates in England. The repeal of the law against witchcraft took place during this period of change and uncertainty over the new combined legislature's ability to perform its tasks, and also the general dynastic and economic complexities of eighteenth-century Britain, including the lingering sentiment in some quarters in favor of the forcible restoration of the (Scottish) Stuart royal line.

Further, the prosecution of witchcraft in both England and Scotland occurred at the intersection of two traditions that jurists generally sought to keep separate—Continental and civil traditions of

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6. The Treaty went into force May 1, 1707. Walker argues that "there was *no* Act of Union, but two distinct Acts, one Scottish and one English, approving and ratifying the Articles [of a Treaty of Union.]" WALKER, *supra* note 2, at 88. For the Scottish and English Acts, see An Act Ratifying and Approving the Treaty of Union of the Two Kingdoms of Scotland and England, 11 ACTS OF THE PARLIAMENTS OF SCOTLAND 406 ch. 7 (1707); and An Act for a Union of the Kingdoms of England and Scotland, 5 Anne ch. 8 (1706). For an influential analysis of the aftermath of the Union and the process of adjusting to it, see LINDA COLLEY, *BRITONS: FORGING THE NATION* 11-145 (1991).

investigation and proof on one side, “native” common law practices on the other.<sup>7</sup> The complex relationship among the national traditions and their legal components will be more fully explored below; more significant than the question whether those distinctions hold up is their importance to those who invoked them. Eighteenth-century legal theorists such as Blackstone and Bentham in England, Kames and Hume in Scotland, were intensely engaged by the question of whether and how the common-law system of maintaining continuity through precedent, and of accommodating change through reinterpretation, could meet the needs of eighteenth- and early nineteenth-century Britain, and how that system might be supplemented or replaced by legislative reform.<sup>8</sup> Appeals to the stability of tradition were countered by various appeals to reason, progress, and natural law—all terms differently inflected by their users, and ramifying differently depending on how one viewed Britain’s past or present.<sup>9</sup>

For example, Henry Home, Lord Kames, appeals to a notion of “perfection” achieved through time when he writes that “[t]he law of a country is in perfection when it corresponds to the manners of the people, their circumstances, their government. And as these are seldom stationary, the law ought to accompany them in their change.”<sup>10</sup> According to David Lieberman, Kames’s *Historical Law Tracts* (1758)—the source of this passage—represented “one of the first published versions of the ‘four stages’ theory of societal development which viewed social changes in terms of four distinct historical periods.”<sup>11</sup> This “stadial model” of history is a unique intellectual contribution of the Scottish Enlightenment, whose exponents include Adam Smith, David Hume, Adam Ferguson, and many others, including the minor historian Robert Henry, whose *History of Britain* Baillie notes as her source for one of the plays in her second published volume. Because it pioneered the systematic analysis of economic and cultural institutions and their reciprocal influences, Scottish Enlightenment thought has come to be credited as the basis for modern sociology. Kames, who like many other Scottish Enlight-

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7. See FARMER, *supra* note 2; BARBARA J. SHAPIRO, BEYOND “REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE (1991).

8. Bentham is, of course, the name most frequently associated with legislative reform and the move to codify the law, whereas Blackstone is associated with claims of the adaptability of the common law. See DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN (1989). See also FARMER, *supra* note 2.

9. On natural law in Scotland, see KNUD HAAKONSSON, NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT (1996).

10. LIEBERMAN, *supra* note 8, at 149 (citing KAMES, SELECT DECISIONS OF THE COURT OF SESSION FROM 1752 TO 1768, at iii (Edinburgh, John Bell 1780)).

11. *Id.*

enment intellectuals, wrote on history, ethics, and aesthetics as well as law, reflects these important new currents as he affirms that the law is a historical subject, and further insists on its interrelationship with other evolving aspects of culture. Kames offers a notably fluid definition of “perfection” in law: he emphasizes the organic and adaptive nature of law, characterizing its perfection not as a concrete and static code but as a relational, evolving force. His definition of perfection by no means precluded either judicial or legislative innovation or initiative.<sup>12</sup>

This question of legal “perfection” is especially complex in that Kames posits it after the Union of Parliaments. For if Kames’s definition of perfection is characterized by harmony among legal, political, and cultural institutions within a nation-state, its achievement might seem more difficult given the legislature’s shift of venue and the attendant changes for Scotland—for example, the small number of Scottish MPs (61 out of 774) in the composite Parliament, and the increased difficulty of effectively influencing a body so physically distant from Scotland.<sup>13</sup> Indeed, the effects and meaning of the Union for Scotland, including the displacement of its legislative body, raise questions not only about Scotland’s relationship to England, but also about the interrelations among Scotland’s institutions, as Scots reacted to ensuing socioeconomic change, and asked themselves whether that change constituted progress or merely assimilation to England. Kames’s understanding of perfection reflects an important dimension of the proto-sociological thinking that famously characterized the Scottish Enlightenment philosophy flourishing in response

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12. Lieberman specifies that law reform so inspired is not necessarily statute reform:

[I]n this period a commitment to the methods and institutions of customary law need not be taken to indicate any lack of commitment to law reform. Indeed, for . . . many [eighteenth-century legal writers,] . . . the most important and recently confirmed lesson of English law was the clear superiority of the courts over the legislature in orchestrating legal development.

*Id.* at 175. Intriguingly, in a footnote, Lieberman notes briefly that Kames was critical of “the use of legal fictions as a technique for adapting common law forms to altered social circumstances.” *Id.* at 172 n.57.

13. According to T. C. Smout,

[Scotland] was given representation in the Westminster Parliament of only sixteen seats among 206 in the House of Lords, and forty-five among 568 in the House of Commons. In all but a few details, Scottish political and economic government had to conform to England’s established practice, and there was little question of the treaty creating institutions that would compromise to make a genuine new British government. For these reasons there was little to stop England from totally absorbing Scotland, except those parts of the treaty guaranteeing the separate existence of the Church of Scotland and the Scottish law courts. These, though not immune from erosion, remain obvious sources of the surviving distinction between the two halves of the same island, and rallying points of national consciousness.

T.C. SMOUT, *HISTORY OF THE SCOTTISH PEOPLE 1560-1830*, at 200 (Fontana Press 1998) (1969).

to eighteenth-century Scotland's historical predicament.<sup>14</sup> It highlights the fact that theorizing the relationship between the components of a culture and its institutions was made both more crucial and more difficult in eighteenth-century Scotland.

For Scotland's civil, criminal, and religious institutions remained officially separate from England's; the significance of that segregation remains a subject of debate.<sup>15</sup> Historians have argued that as a result of legislative and economic union, Scotland's remaining separate institutions—legal, religious, and educational—took on increased status as possible repositories of Scottish national identity within Great Britain.<sup>16</sup> Others note that cultural institutions—learned societies, history clubs, journals and the like—also stepped in to help take the place of political institutions in eighteenth-century Scotland.<sup>17</sup> Thus both law and literature can be viewed as having taken on new nationalist meanings, raising the stakes for representations of the past and of change leading to the present.

#### CRIME AND PUNISHMENT

The criminal law of Scotland has remained distinct from England's, leading some historians to assign it a particular national status and significance as a locus of Scottish identity within Britain. In part to emphasize its distinctness, some assign a more prominent position in Scots law to the Roman civil tradition, whose place in English law

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14. See, e.g., HAAKONSSSEN, *supra* note 9, at 1 (stating that "[i]t has long been a commonplace that the thinkers of the Scottish Enlightenment understood the moral life and moral institutions of humanity in social and historical terms; in fact, they have been seen as pioneers of holistic methods of explanation and of historical sociology"). On the Scottish Enlightenment in relation to literary history, see JAMES CHANDLER, *ENGLAND IN 1819: THE POLITICS OF LITERARY CULTURE AND THE CASE OF ROMANTIC HISTORICISM* (1998).

15. See SMOUT, *supra* note 13; COLLEY, *supra* note 6.

16. Analogous disputes over the relationship between Scots and English Established religious institutions continued throughout the eighteenth and early nineteenth centuries. There was strong resistance to any enforced uniformity both within and between the two established churches. That resistance led in 1843 to the great Disruption in the Church of Scotland, which was caused in part by a dispute over the jurisdiction of the House of Lords to resolve a disagreement in Scotland concerning the appointment of a minister. Some historians argue that nostalgia for Scotland's Puritan days fed into the disruption. See, e.g., STEWART J. BROWN, *THOMAS CHALMERS AND THE GODLY COMMONWEALTH IN SCOTLAND* 211-81 (1982).

17. Nicholas Phillipson argues that

many of the distinctive ideas and activities of the Scottish intelligentsia should be read as part of a process whereby a provincial society which had lost its political identity with the abolition of the Scottish Parliament turned to other institutions to further an already established program of improvement—a process evinced in the creation of new bodies like the polite societies of Edinburgh and the strengthening of older institution like the universities.

LIEBERMAN, *supra* note 8, at 161 n.5 (citing Nicholas T. Phillipson, *Culture and Society in the Eighteenth Century Province: The Case of Edinburgh and the Scottish Enlightenment*, in *THE UNIVERSITY IN SOCIETY* 407, 407 (Lawrence Stone ed., 1974)).



is more disputed and less emphasized.<sup>18</sup> Others claim that Scottish law, like England's, has remained above all an independently evolving system of common law, and thus was not dependent for its character on a legislature, however constituted and wherever based.<sup>19</sup> Despite their differences, each of these two opposite versions of the history of Scottish law has a potentially nationalist dimension: one claims faithfulness to a native tradition that resists outside influence; the other is less concerned with origins, but claims that a national character is developing and expressing itself ever more clearly. According to Lindsay Farmer, whether the emphasis is placed on separate origins or separate practices, historians of Scottish criminal law have long claimed both that progress occurred after Union and that such progress involved no compromise of Scotland's separate identity.<sup>20</sup> For these writers, independence from English legislation demonstrated Scotland's continued separate cultural existence despite its Union with England, and preserved the native genius that was expressed in Scotland's criminal law.

In this history, the publication of Baron Hume's *Commentaries on the Law of Scotland Respecting Crimes* (1797) constituted an epoch in Scottish legal history, a generation before Baillie's play. As Farmer explains, "[T]he belief that the law matured in the late eighteenth century, taking the form of liberal and flexible principles, [was] set out clearly for the first time by Hume."<sup>21</sup> Hume affirms the

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18. The proponents of this view included Sir George Mackenzie, author of one of the sources that Baillie draws on in *Witchcraft*. See *infra* note 52 and accompanying text. Baron Hume, on the other hand, refutes this emphasis on the Roman civil tradition. Hume writes,

It seems to be the better opinion (and such are the sentiments of Sir Thomas Craig and of Lord Stair) that, even in the civil department, the Roman Law never attained to a binding authority like that of our own customs or statutes. . . . If this be true of the civil department, much more must it be so for the criminal.

WALKER, *supra* note 2, at 506 (quoting DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING TRIAL FOR CRIMES, at vii-lviii (Edinburgh, A. Neill & Co. 1797)). This position accords with Farmer's sense that Hume preferred to emphasize the native Scots common-law character of the criminal law.

19. See, e.g., FARMER, *supra* note 2, at 24.

20. According to Farmer, the criminal law was indeed a site for eighteenth-century Scottish cultural nationalism:

There was a great deal of criticism being directed at the overall quality of the legislation that was being produced by the eighteenth-century Parliament, and in particular the harsh penal legislation. Hume does not shrink from making a series of barbed comments about this, in order to assert the value of a system that developed in accordance with the manners and experience of the people. This must also be read within the specific Scottish context. There was a longstanding belief that the new British Parliament was not providing adequately for Scottish needs. However Scottish lawyers were not making a plea for more attention, but were asserting their own self-sufficiency. Legislation would not be necessary because the Scottish common law was capable of responding with the necessary 'native vigour.'

*Id.* at 37.

21. *Id.* at 26. Indeed, Hume still has high status in Scottish legal history. According to

sense that the past had been leading progressively to a more enlightened present:

This idea of 'maturity' also carries with it a certain distinctly 'Whig' view of history. . . . The history of [Scottish] law is told as a movement towards central organization and rationality—the quality of maturity—and we readily assign the labels of barbarism and irrationality to the law of the period preceding Hume.<sup>22</sup>

A lasting result of Hume's book and its outlook has been "another, even more curious consequence"—namely, that the history of the criminal law "stops in the early nineteenth century when the institutions that are regarded as important to us are recognizably in place."<sup>23</sup> The ensuing history of the criminal law has thus been regarded as a mere iteration of early-nineteenth-century principles and institutions, of stasis after a period of rapid change. This "maturity," like Kames's "perfection," does not preclude change, but it places more emphasis on Scotland's independence from England. Furthermore, it strongly implies the autonomy of criminal law from the rest of culture: whatever changes might take place in this "mature" system would leave it unchanged in some essential way.

Baillie's play was written in this period of "maturity," but not necessarily to affirm it. The play looks with an expatriate's eye on both Scottish and English criminal legal traditions and on the history of their relationship. It uses the repeal of the witchcraft law to analyze the cultural value, including nationalist value, attaching to all legal change and to this change in particular. By thinking through this period of change, including both celebrations of it and resistance to it, Baillie can assess and critique not only the two somewhat conflicting cultural-nationalist histories of Scottish criminal law, but also the relationship of criminal law to the nation as a whole.

#### WITCHCRAFT PROSECUTION: A LEGAL CRUX

Witch-belief and witchcraft prosecution, as they mix religion, folkways, and (sometimes aberrant) legal practices, provide a particularly rich field for exploring the relationship of criminal law to other aspects of culture. The repeal of the witchcraft law took place after

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Walker,

Not only is his examination, based on the primary sources, invaluable, but it supplied the deficiency arising from the absence of reports of criminal cases. . . . [I]n his Introduction, Hume sought to rescue the law of his native country from the state of declension in the esteem of some part of the public, into which of late years, it had seemed to have been falling, owing, he was persuaded, principally to their being ignorant of what it really was.

WALKER, *supra* note 2, at 505.

22. FARMER, *supra* note 2, at 30-31.

23. *Id.* at 32.

the Union of Parliaments, and evidently was lamented by a vocal minority of Scottish nationalists and religious separatists well into the eighteenth century.<sup>24</sup> The fact that witchcraft was dropped from the books in 1736 might appear to bespeak a new understanding of the nature of crime; however, since that repeal came only after Union, it could seem like an import from England. Thus for Baillie's contemporaries, the case of witchcraft might evoke either the image of Scotland's former backwardness or of its intellectual and cultural "progress." After all, the witch-hunt in Scotland is widely acknowledged to have been particularly long and intense, compared to that in England, in part because of the nature of Scotland's legal system. The history of witchcraft and the witch-hunt might undermine Scots' pride in some aspects of their distinctive legal tradition, while the size of the witch-hunt and its practices could be used to shore up English stereotypes of Scots as intellectually backward and prone to religious fanaticism.

Complicating these questions of national tradition and national character, witchcraft raises further legal questions through its classification under the rubric of *crimen exceptum*<sup>25</sup>—that is, its status as an exception to the normal rules of evidence and procedure. At witchcraft trials, not only did courts hear evidence from people who were normally excluded from testifying,<sup>26</sup> but standards for corroboration were also unusually weak, since witchcraft was defined as a crime that defies the usual forms of explanation. According to Christina Lerner, there were two crucial criteria for witchcraft in Scotland: *malefice* (evil done by supernatural means), and the making of a compact with the Devil.<sup>27</sup> *Malefice*, by definition, is ill worked through ways that defy natural explanation, and satanic involvement takes the crime out of the realm of the earthly. In the 1697 witchcraft case that served as Baillie's source, the Advocate (or prosecutor for the Crown) argues that witchcraft necessitates these exceptions regarding witness and corroboration because of its vexed relation to the normal procedures of authentication:

Witches meeting in the night time, adore their lord, contrive their malefices, and accordingly thereafter execute them when

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24. See, e.g., HUGO ARNOT, COLLECTION AND ABRIDGMENT OF CRIMINAL TRIALS IN SCOTLAND 414-15 (Glasgow, A. Napier 1812) (1785); see also SMOUT, *supra* note 13, at 192 (noting that "for a long time afterwards this Act was still regarded by some Seceders as 'contrary to the express law of God'").

25. "This category [of *crimen exceptum*], known to both the common and the civil law, was composed of secret crimes unlikely to produce the usual kinds of evidence or witnesses." SHAPIRO, *supra* note 7, at 165.

26. See CHRISTINA LARNER, ENEMIES OF GOD: THE WITCH-HUNT IN SCOTLAND 44 (1981).

27. See *id.* at 107-18.

other . . . witnesses are asleep, or the witches themselves are covered from sight; we say that this can be no otherwise proven than by these that are intimate to it, joined to the positive proof and adminicles before mentioned. . . . For as reason hath things intelligible and faith things supernatural; so the senses have things corporal for their objects, whereanent they are to be trusted, aye and while it be proven that the appearance is impossible, or the witness of it is an impostor. It is a part of the Witches purchase from the devil, that they cannot be seen at some occasions.<sup>28</sup>

Since ordinary rules regarding sense data and their interpretation categorically did not apply in witchcraft trials, legal forms of explanation were relaxed. As Hugo Arnot wrote of the same case in 1785, the girl accusing witches, “[h]aving . . . impressed the public with the most complete and fearful conviction of her being ‘grievously vexed with a devil,’ found herself capable to command the implicit assent of the spectators, in matters that were repugnant to the evidence of their own senses.”<sup>29</sup> For Arnot, unlike his predecessors, what cannot be explained naturally simply cannot have occurred; for him, “fraud and imposition” are the obvious alternatives to “supernatural influence.”<sup>30</sup> Sir Walter Scott remarks mildly in 1831, “The proof lent in support of the prosecution [of witches] was of a kind very unusual in jurisprudence.”<sup>31</sup>

As noted above, Scotland’s claims to Roman legal traditions are important to writers wishing to differentiate its law from England’s. Those traditions regarding evidence, in particular, came to the fore in the investigation and prosecution of witchcraft. The supposed nature of the crime of witchcraft—that it was necessarily committed in secret—aggravated a dependence upon the Roman tradition of *inquisitio*, or inquisition. As Larner puts it, at the height of the witch-hunt, “The Scottish system was Roman, inquisitorial, and theoretical; the English based on statute law and pragmatic. A person accused of witchcraft under an inquisitorial system was tortured to confess and to name accomplices.”<sup>32</sup> According to Larner, the making of a

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28. HISTORY OF THE WITCHES OF RENFREWSHIRE 146-47 (John Millar ed., Paisley, J. Neilson 1809).

29. ARNOT, *supra* note 24, at 408.

30. *Id.*

31. WALTER SCOTT, LETTERS ON DEMONOLOGY AND WITCHCRAFT 242 (London, Routledge 1884) (2d ed. 1836).

32. CHRISTINA LARNER, WITCHCRAFT AND RELIGION: THE POLITICS OF POPULAR BELIEF 77 (1984). Yet according to Shapiro, in England the result of witch prosecution was different:

On the Continent the crime of witchcraft was *crimen exceptum*, which because of its secret commission, was to be handled differently from ordinary crimes. The *crimen*

compact with the Devil could be established in one of two ways: by confession, often obtained by sleep deprivation, starvation, and other means; or by the discovery of the “devil’s bite,” a place on the accused’s body that was insensible to touch. This “bite” was searched for by “pricking” with pins, a service provided by expert prickers, and one not much distinguishable from torture.<sup>33</sup> Thus at a time when English law was developing in the direction of heightened proof standards, Scots lawyers were relying on archaic forms of proof in witchcraft cases.

Evidentiary standards in these cases were further complicated by the fact that in witchcraft trials, as throughout Scottish criminal law, “habit and repute,” or “having the reputation of a criminal,” was admissible and could count as evidence against the accused.<sup>34</sup> Rumor thus took on the status of a socially determined probability, and gained the status of evidence. According to Barbara J. Shapiro, this principle was borrowed from the civil and canon law traditions:

Indirect proof consisted of such things as rumor, fame, suspicion, signs, conjecture, the *indicia*, presumptions, and circumstantial evidence, which were categorized in loving detail by medieval canonists and civilians. . . . [However, a]ccording to the Roman canon theorists, indirect or circumstantial proof, no matter how good, did not constitute legal proof. . . . [Instead,] indirect proofs were used to evaluate the accused, and if there were enough, then they could be put to torture.<sup>35</sup>

The rhetoric of the aforementioned Advocate exemplifies this way of thinking: “Now upon the whole, you will take notice, that presumptions being vehement, make a more certain probation than witnesses; because presumptions are natural emanations of the thing itself, which cannot be bribed; whereas witnesses are [susceptible to influence].”<sup>36</sup>

By 1785 Arnot expresses this reforming view back upon the prosecution of witchcraft:

*The want of Science, and of Civil Liberty* is the fundamental source of those proceedings, where Tyranny and Superstition,

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*exceptum* that provided the most discussion in England was witchcraft. In most Continental jurisdictions it was recognized that in such crime the normal standards of proof, two good witnesses or confession, would rarely be met. They therefore permitted conviction in the basis of *indicia*, that is, circumstantial evidence. The witchcraft literature, both English and Continental, is full of the language of signs, or *indicia*, and half proofs.

SHAPIRO, *supra* note 7, at 209.

33. See LARNER, *supra* note 26, at 107-18.

34. See *id.* at 113.

35. SHAPIRO, *supra* note 7, at 203.

36. HISTORY OF THE WITCHES OF RENFREWSHIRE, *supra* note 28, at 143.

masked in the solemn garb of Law and Justice, stride horrible with all their ghastly train, of confiscation, torture and murder . . . . And the same want of Science and of Liberty, which gave occasion to the enactment of sanguinary law, introduced carelessness into the forms of judicial proceedings, and injustice in the measure of legal evidence. Beyond all her other qualifications, then let Science be revered as an antidote to Superstitions, a friend to Civil Liberty, and as *the true Philosopher's Stone*.<sup>37</sup>

The uncertainty and even circularity of the definitions of the crime, and of the evidence that substantiated it, provided the conditions for what could easily be seen as socially sanctioned harm. One could even argue that the witchcraft trial involved legally instituted violation of legal principles. This category of legal illegality also underwrites the other crime that drives Baillie's plot: the crime of dueling. Here, as with witchcraft, historical change and the gap between legal principles and legal and social practice are crucial. Dueling is a mark of what might be termed "primitive justice"—that is, personal justice that is virtually indistinguishable from revenge. Dueling is also a feudal holdover, the last vestige of the trial by combat, and a mark of aristocratic tradition. The early nineteenth century witnessed a resurgence in dueling, partly as a result of the Napoleonic conflict's spread of military practices, and partly as an aristocratic response to the increasing power of the middle class and middle-class values. Charges were often not pressed or reduced, and judges and juries routinely either declined to convict or reduced the charge, despite the fact that a manslaughter charge is obviously absurd in the case of a ritual event that not only reveals but also essentially *celebrates* the intent to kill.<sup>38</sup> As such, dueling resembles witch-belief insofar as it marks the problems of changing standards of legality and the gap between statute and practice. The inclusion of dueling in the play reinforces Baillie's commentary on the evolutionary or historical character of law, and underscores the difficulty of "perfecting" it when the people it serves are changing in so many ways. The combination of witchcraft and dueling thus draws attention to a very proximate "primitive" past, to the in-built uncertainties in the process of modernization, and to the lingering questions the past and the process both leave. The nationalism of eighteenth- and early nineteenth-century historians and theorists of Scots law could appear

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37. ARNOT, *supra* note 24, at 416.

38. See V.G. KIERNAN, *THE DUEL IN EUROPEAN HISTORY: HONOUR AND THE REIGN OF ARISTOCRACY* 204-23 (1988).

either as pride in Scotland's legal past or confidence in the evolutionary direction of its present; Baillie's play endorses neither.

Yet witchcraft prosecution did participate in an important evolutionary process that later involved specifically Scottish intellectual contributions as well: the development of circumstantial evidence and its concomitant effects on legal judgment. Shapiro argues that circumstantial evidence became increasingly valued over testimony throughout Britain in the course of the eighteenth century, and she traces the trend in part to the after-effects of witch prosecution.<sup>39</sup> The emerging preference for circumstantial evidence can be attributed to growing discourses of objectivity related to one strain of general Enlightenment thought.<sup>40</sup>

However, Shapiro argues instead that a different category of "moral certainty," which involved assertions of the adequacy of human judgment despite the impossibility of complete proof, was a more important factor in the growth of reliance on circumstantial evidence than were claims to objective or scientific knowledge. Shapiro traces this development specifically to Scottish Enlightenment sources, especially the work of Thomas Reid and the Common Sense school, and sees the discourse of "moral certainty" as rooted in the Common Sense rejection of philosophical skepticism and its insistence that humans could indeed have access to the truth—access that might be adequate for action and for judgment.<sup>41</sup> Thus Scottish

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39. According to Shapiro, "The crime of witchcraft may have had a far greater role in the development of English criminal law than we hitherto suspected, not because so many individuals were caught in its net, but because doctrinal writings on witchcraft provide the most extensive early public discussion of circumstantial evidence." SHAPIRO, *supra* note 7, at 209.

40. See ALEXANDER WELSH, *STRONG REPRESENTATIONS: NARRATIVE AND CIRCUMSTANTIAL EVIDENCE IN ENGLAND* (1992). Welsh argues that circumstantial evidence comes to the fore only in the late eighteenth and early nineteenth centuries, in part through a belief that less human error would result. Welsh cites the following passage from an early nineteenth-century Scottish legal treatise:

It may happen in a particular case, that the circumstances are such, as to create in the mind even a stronger degree of faith than direct testimony; and in this, circumstantial evidence (the witnesses being all *credible*) differs from positive, that in the former there is not the same risk of error and falsehood.

*Id.* at 22 (quoting JOHN BURNETT, *A TREATISE ON VARIOUS BRANCHES OF THE CRIMINAL LAW OF SCOTLAND* 523 (Edinburgh, G. Ramsey & Co. for A. Constable 1811)).

41. Shapiro elaborates:

If Thomas Reid and his Common Sense school successors developed an inductive philosophy of mind which somewhat modified Locke on the nature of sensation, perception, and the formation of ideas, the most important feature of the Common Sense philosophers for our purposes is the emphatic rejection of the centuries-old philosophical tradition which insisted that demonstration alone yielded certainty and that everything else, including the best attested matters of fact, yielded only probable opinion. Such a position, they insisted, might be taken by a logician but had no meaning in ordinary speech or everyday life. Thus a good deal of the evidence derived from testimony, which for the traditional philosopher was merely "probable," was properly classified as certainty by the rest of mankind. . . . The Common Sense school was especially anxious to

law's Roman roots, part of its distinctive identity, were foregrounded during the seventeenth-century witch trials, but they involved that tradition's cruelty and irrationality. At the end of the eighteenth century, Scottish philosophy's contribution to changes and adaptations within legal discourse received new emphasis. In one version of the history of evidentiary thinking, then, one stage could, in effect, redeem the other, while reinforcing a sense of Scotland's independent progress. As I will show below, the very concerns leading to the development of the concept of "moral certainty" are featured prominently in Baillie's play.<sup>42</sup> The redemptive narrative also emerges, but not unquestioned.

Degrees and kinds of uncertainty are strongly associated with the crimes that form the basis of Baillie's complex plot. Baillie's examples focus on how material evidence is constituted by the products of observation and collection, including objects and eyewitness accounts, and how circumstantial evidence involves the assessment of probabilities and thus, by extension, cultural assumptions. Her analysis of evidence focuses on its social character: collecting and interpreting material and circumstantial evidence, she emphasizes, necessarily involve both subjective disposition and outside influence. This would suggest that the law's mutability is not a positive good, as Kames suggests, but is simply an inevitable fact. Moreover, it would interrogate, though not reject, the category of moral certainty that

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counter the skepticism of Hume, which insisted that no amount of evidence could remove doubt. Thus Dugald Stewart, like Reid, insisted that while it was always logically possible that judgment in matters of fact might be mistaken, there were some instances in which they were as certain as any Euclidian truth.

SHAPIRO, *supra* note 7, at 28. Shapiro goes on to show how these ideas came to influence the concept of "moral certainty" correlative with the absence of reasonable doubt. Compare Haakonssen:

Reid's general criticism of the empiricist theory that all simple ideas stem from sense or feeling whereas all complex ideas are constructed by the mind from simple ideas [claims that t]his . . . is as false of moral knowledge as of all other knowledge, first because the moral faculty in fact begins with complex ideas and only by analysis reaches simple ones, and second because such analysis reveals the presence of ideas . . . which are not derived from any form of sensation but rather from the native operations of the mind.

HAAKONSEN, *supra* note 9, at 191.

42. Matthew Wickman claims that the move toward circumstantial evidence parallels other aspects of the discourse of "improvement" so energetically promoted by the Enlightenment in Scotland and elsewhere. According to Wickman,

Circumstantial evidence, by comparison [with witness testimony or confession] educed a kind of surplus value, as facts . . . now acquired the capacity to speak for themselves . . . a speech [which was] the commodified product of a system in which neither witnesses, jurors, nor lawyers were wholly accountable for the facticity of the fact.

Matthew Wickman, *The Allure of the Improbable: Fingal, Evidence, and the Testimony of the Echoing Heath*, 115 PMLA 181, 187 (2000). Baillie's play certainly casts a skeptical eye on the notion of facts speaking for themselves; however, counter to Wickman's claims about other Scottish literary writers of the period before Baillie's, her play betrays no nostalgia for testimony as a more situated or social form of evidence.



Shapiro documents as emerging in the late eighteenth and early nineteenth centuries.

### THE COMPLEX PLOTS

Before the play's action begins, a gentleman named Murrey has fought a duel and killed his opponent. The only witness to the duel having left the country, Murrey has been accused and convicted of murder and sentenced to die. He has escaped prison, exchanged clothes with a faithful servant, and absconded; when the play opens, he has been in Ireland nearly two years. Meanwhile, an accident has killed the servant; when his disfigured corpse, with his master's possessions, is discovered, Murrey himself is believed dead. Because witch-belief is rife in the area, a sighting of Murrey with his daughter Violet out on a moor on a stormy night leads to accusations that she has been consorting with the devil for her own ends. These accusations are bolstered by another purported instance of witchcraft: the bewitching of Jessie, the younger sister of the local laird, Dungarren. Dungarren, one of only two characters who do not believe in witchcraft, happens to be in love with Violet. Assorted members of Jessie's household ascribe her persistent fever to witchcraft, but Violet's arrest as her supposed tormentor is largely based on the manipulations of Annabella, Violet's rival for Dungarren's love. Annabella throws suspicion on Violet in part through the aid of Grizeld Bane, an old peasant woman who has recently arrived in the neighborhood. Grizeld is a reputed and self-proclaimed witch who has encouraged other peasant women and beggars to join her in league with the devil. In an instance of the familiar trope of the "rationalized Gothic,"<sup>43</sup> each crime eventually proves to be no crime: Murrey turns out to be a duelist, not a murderer; Violet is freed of the false accusations against her; Grizeld Bane, not a witch, proves merely mad, having been driven insane by the execution of her husband for murder; her collaborators have merely been made to share her delusions. However, despite this elaborate series of revelations, only an officer bearing news of the repeal of the witchcraft law in Parliament prevents the execution of the accused witches, over the protests of the local people, who insist that the witches were convicted under the "gude old laws"<sup>44</sup>—an objection that echoes the religious separatists in Arnot's collection.<sup>45</sup> Though Baillie devotes an extraordinary

43. Michael Gamer, *National Supernaturalism: Joanna Baillie, Germany, and the Gothic Drama*, 38:2 THEATER SURVEY 49 (1997).

44. JOANNA BAILLIE, WITCHCRAFT, in DRAMAS 1, 161 (act 5, sc. 2) (London, Longman, Rees, Orme, Brown, Green & Longman 1836).

45. See *supra* note 24 and accompanying text.

amount of energy to the task of reducing these allegedly supernatural events to the status of the mundane, she nevertheless makes this final reprieve hinge not on some newly enlightened view of proof and evidence, but on the arrival of a functionary who simply compels the locals to abandon the execution.

#### THE DOCUMENTS IN THE CASE

Baillie's play can be seen as part of a small flurry of publication of witch trials in Scotland resulting from the activity of history clubs.<sup>46</sup> Such clubs flourished in Scotland in the early nineteenth century, as part of the Romantic-era quasi-nostalgia for Scotland's independent culture, separate from its political Union with England. Baillie's play reflects their preoccupation with witchcraft and witch trials. Clearly, witchcraft provides an occasion for formulating issues of Scottish identity and of legal principle.

In *Witchcraft*, Baillie actually stages the repeal of the law against witchcraft, which took place in 1735, and combines it with features of the last great witch hunt in Scotland, which led to the burning of seven witches in 1697.<sup>47</sup> Baillie thus interrogates the process of legal change, its sources, and the disruptions it can entail. Textual evidence suggests that she based her representation of witch-belief on histories and analyses of witchcraft written by Scottish lawyers at various points over more than a century. These include the *Treatise on Witchcraft* by Sir George Mackenzie, published with his *Laws and Customs of Scotland in Matters Criminal* (1678); Hugo Arnot's *Collection and Abridgment of Criminal Trials in Scotland* (1785, reprinted 1812); lawyer and novelist Sir Walter Scott's *Letters on Demonology and Witchcraft* (1831); and, most importantly, an account by Sir Francis Grant of the 1697 case mentioned above, describing the evidence and arguments regarding the supposed demonic possession of one Christian Shaw of Bargarran.<sup>48</sup>

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46. See LARNER, *supra* note 32, at 33.

47. Between that time and the repeal of the witchcraft law in 1735, there were no large-scale witch scares (though the last witch may have been executed as late as 1727). See *id.*

48. [SIR FRANCIS GRANT], A TRUE NARRATIVE OF THE SUFFERINGS AND RELIEF OF A YOUNG GIRLE: STRANGELY MOLESTED BY EVIL SPIRITS AND THEIR INSTRUMENTS IN THE WEST. COLLECTED FROM AUTHENTICK TESTIMONIES (Edinburgh, James Watson 1698). According to Sharpe,

In the year 1697, occurred the trial and condemnation of many persons for bewitching Christian Shaw, a girl about eleven years of age, the daughter of John Shaw of Bargarran. The particulars of this comic tragedy were collected by John MacGilchrist, town-clerk of Glasgow, and embodied in a pamphlet written by Mr. Francis Grant, advocate, afterward a knight, and lord of session, with the style of Lord Cullen.

CHARLES KIRKPATRICK SHARPE, ESQ., A HISTORICAL ACCOUNT OF THE BELIEF IN WITCHCRAFT IN SCOTLAND 171-72 (London, Hamilton, Adams & Co. 1884). Sharpe also notes a 1775 edition. See *id.* at 258. Sharpe's text was originally published as the introduction to his edition

Baillie's representation of witch-belief bears on the history of Scottish criminal law in part because it interweaves aspects of a specific case history with echoes of standard legal works—that is, works on witchcraft written by lawyers. As noted above, the Shaw case was the last great witch-hunt in Scotland, and nearly the last capital trial of witches.<sup>49</sup> The case involved the supposed possession of a preteen girl named Christian Shaw, daughter of the Laird of Bargarran. In the published account of the case, Shaw claimed to be tormented by witches; she went into fits, spit unexplained objects from her mouth, and cried out that she saw her tormentors, invisible to others, in her room—tormentors whom she identified as members of the community. A warrant of Privy Council was issued, and the case was investigated and brought to trial. Many of the accused confessed and implicated one another, some before trial, and some during the trial. These people—some young women, some old, some children—attested to midnight meetings with Satan, night flying, and plans to harm various people. One confessed witch, John Reid, was found dead in the locked room where he had been left alone, and was presumed murdered by the devil.

Accounts of the case appeared in other subsequent volumes, including Hugo Arnot's. Arnot characterizes Shaw as the "Impostor of Bargarran" rather than using her proper name. Summarizing the *Narrative*, Arnot writes:

In the month of August, 1696, within a few days after her quarrel with [a] housemaid, the girl was seized with hysterical convulsions, which in repeated fits displayed that variety of symptoms which characterise this capricious disease. To these, other appearances were speedily added, which could only be attributed to supernatural influence or to fraud and imposition. She put out of her mouth quantities of eggshells, orange-pills, feathers of wild, and bones of tame fowl, hair of various colours, hot coal cinders, straws, crooked pins, &c.<sup>50</sup>

A more sympathetic account was published at Paisley in 1775, and reprinted, near the site of the case, in 1809. This account, *A History of the Witches of Renfrewshire who were Burned on the Gallow-green of Paisley*, added various other documents to the original narrative and collocation of testimony from the trial. The 1809 edition included information by doctors asserting the reality of Christian's symptoms of possession, confessions of two of the supposed witches,

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of ROBERT LAW, MEMORIALLS, OR, THE MEMORABLE THINGS THAT FELL OUT WITHIN THIS ISLAND OF BRITTAIN FROM 1638 TO 1684 (Edinburgh, A. Constable 1819).

49. See LARNER, *supra* note 32, at 77.

50. ARNOT, *supra* note 24, at 408.

the Advocate's speech to the inquest, the text of the repeal of the witchcraft statute, Arnot's skeptical account of the case, and accounts of Christian Shaw's later life as a virtuous minister's wife who was the first to bring spinning mills to Paisley, greatly to its economic benefit. This volume may well have been Baillie's source, although, as I will show, there is also some internal evidence that she consulted Arnot.<sup>51</sup>

The degrees of witch-belief vary in Baillie's apparent legal authorities. Mackenzie's *Treatise on Witchcraft* is distinctive in being the main authority Baillie cites that credits the existence of witchcraft, though Mackenzie remains skeptical about some supposed witches.<sup>52</sup> Arnot is notably skeptical of witchcraft in general and of this case in particular.<sup>53</sup> Scott, Baillie's friend and frequent correspondent, cites Mackenzie among other experts; he gives the Shaw case only a paragraph. Scott remarks significantly, "The abstract possibility of apparitions must be admitted by every one who believes in a Deity, and His superintending omnipotence. But imagination is apt to intrude its explanation and inferences founded on inadequate evidence."<sup>54</sup> Scott is willing to entertain the idea of the supernatural in principle, but he suggests that most cases are based on mistaken interpretation of sense data; indeed, the opening pages of the *Letters on Demonology and Witchcraft* are devoted to a catalogue of the senses, arranged according to how easily they can be misled. Baillie specifically emphasizes this theme in her play.

Baillie reflects some of the questions raised by the work of legal theoretical writers in her choices of, and changes to, details from the

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51. Arnot's treatment of Christian Shaw lacks the detail of the *History of the Witches of Renfrewshire*, see *supra* note 28, but has an overtly skeptical attitude toward the case and toward witchcraft in general, as well as an overall progressivist historicism, asserting that criminal justice has made great strides in the eighteenth century. In the preface to his text Arnot remarks,

The Criminal Records of a Country are an historical monument of the ideas of a People, of their manners and jurisprudence; and in the days of ignorance and barbarism, they exhibit a striking, but hideous picture of human nature . . . While those materials gratify curiosity, they also afford useful information. They show what bitter fruits are produced under the gloomy climate of a tyrannical Government, and a superstitious Priesthood; and they afford us ample ground of consolation, when we compare those bitter fruits with the blessings which we enjoy under a free government, and in an enlightened age.

ARNOT, *supra* note 24, at iii. Baillie echoes Arnot in her introduction to a later edition of her play, in which she remarks that a defendant in a witchcraft trial was unlikely to get a "fair trial" or an "unprejudiced judge." BAILLIE, *supra* note 3, at 613.

52. "[I]t may be answered, that . . . all sins and vices are the effects of delusion; nor are witches more deluded by melancholy, than murderers by rage and revenge." GEORGE MACKENZIE, *TREATISE ON WITCHCRAFT, in HISTORY OF THE WITCHES OF RENFREWSHIRE*, *supra* note 28, at 8.

53. Arnot refers to executions for witchcraft as "*the legal murders of the court*." ARNOT, *supra* note 24, at 416.

54. SCOTT, *supra* note 31, at 46.

case histories. At the same time, her play presents the repeal of a capital statute; the use of capital punishment was hotly debated in the early nineteenth century among penal reformers. Furthermore, the witchcraft statute had always been unevenly enforced, involving a disputed value, witch-belief, that raised the aforementioned issues of statute versus practice and manners versus law. However, rather than reproducing her sources exactly, Baillie borrows and alters details to make the legal documents speak to each other in a unique and dramatic way.

#### THE EVIDENCE OF THE PLAY

Baillie goes to some lengths to provide a historically accurate representation of the seventeenth-century witchcraft prosecutions in her play. For example, one of the forms of *malefice*, or evildoing, most frequently attributed to witches involves the ability to make their victim inexplicably ill—hence Baillie features a sick child in her play. The ultimate proof of guilt in Scottish witch-hunts involved a pact with the devil—a feature that Baillie incorporates when she stages a *Macbeth*-like scene in which her witches gather on a stormy night to attempt to establish such an agreement. Even the practice of hanging witches before they are burnt (a detail in which one convicted witch in the play takes some comfort) is historically accurate.<sup>55</sup> Her engagement with the topic thus goes far beyond its sensational nature.

Baillie's play reflects the issues raised in the witchcraft literature involving the social and legal problems associated with witch-belief, focusing on the problems of evidence detailed above. Reflecting both Mackenzie's observations and the Scottish tradition of suspecting those of evil "habit and repute,"<sup>56</sup> Baillie's witches are nearly all old, poor, bitter, and lowly regarded women: they seem mostly to want food and revenge against those who refuse them help or respect. The main *soi-disant* witch, Grizeld Bane, is deluded by melancholy, as Mackenzie believed many false witches were. Having

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55. See LARNER, *supra* note 32, at 113.

56. According to Larner,

[I]t is hard to overemphasize the importance of reputation in the production of a witch in Scotland. Alongside the individual charges of malefice, supporting them and finally summing them up, we find frequently that the accused was of 'ill fame', a "rank witch", 'by habit and repute' a witch. . . . Reputation was considered by lawyers and demonologists to be in itself a sign (though not a proof) of witchcraft.

*Id.* at 103. Larner quotes Arnot in 1785 lamenting that such use of reputation extended beyond witchcraft: "'Habit and repute' is a very dangerous doctrine of the law of Scotland, at this minute in full force by which a man may be hanged altho' hardly any charge be exhibited against him, but that he has a bad character." *Id.* (quoting ARNOT, *supra* note 24, at 367).

never recovered from her husband's death, she has repeated visions of him as the devil's henchman.<sup>57</sup>

Baillie never explicitly acknowledges or reproduces the Christian Shaw case, only remarking casually in a later edition of the play that she had once read an account of a witchcraft trial: "The story is entirely imaginary, one circumstance excepted . . . a real circumstance mentioned, I believe in one of the trials for witchcraft, though I forget where."<sup>58</sup> This claim is quite disingenuous; indeed, Baillie selectively employs features of the case throughout her play. The name Bargarran becomes Dungarren. Christian is split into two separate characters: Jessie, a feverish little girl who never speaks, and whom others believe is possessed, and Annabella, who is actually possessed not by demons but by sexual jealousy. At the outset, Annabella is partially skeptical of witchcraft, and she engineers evidence against the innocent Violet while consorting with Grizeld Bane and the other women who claim to be witches.<sup>59</sup>

Baillie incorporates numerous minor details from the case, varying them only slightly. In the original case, shreds of cloth in the Christian Shaw's hand proved a witch had been invisibly visiting her.<sup>60</sup> However, in the play, the wicked young lady, Annabella, has

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57. Mackenzie cites the Dutch authority Wier: "That such as are accused of witchcraft, are ordinarily silly old women, whose age and sex disposeth them to melancholy, and whose melancholy disposeth them to a madness, which should render their confessions very suspect." MACKENZIE, *supra* note 52, at 6 (quoting JOHAN WIER, DE PRÆSTIGIIS DÆMONUM, ET INCANTATIONIBUS (1563)).

58. In the introduction to a later edition of the play in her collected works, Baillie calls attention to the detail of the "piece rent from the gown of the supposed witch, produced in court as a proof that she had actually been present, though invisible, in the chamber of the tormented patient,—a real circumstance, mentioned, I believe in one of the trials for witchcraft, though I forget where." BAILLIE, *supra* note 51, at 613. This seems quite disingenuous, as if she were implying that this one case had not been her primary source, when so much comes from it. Interestingly, Baillie had similarly denied that one of her earlier plays, *De Montfort* (1798), had been adapted from Schiller's *Die Räuber* (1781). See Maureen A. Dowd, "By the Delicate Hand of a Female": Melodramatic Mania and Joanna Baillie's *Spectacular Tragedies*, 9 EUROPEAN ROMANTIC REV. 469 (1998). Dowd notes that in denying the accusation that she had drawn inspiration from Schiller by claiming she had never read him, Baillie "displaces her anxiety about the similarity of her work to German drama of ill-repute onto the more conventional (and acceptable) anxiety about literary influence." *Id.* at 472. Whatever her motivation for not acknowledging the basis of her play in the Schiller case, here it serves perhaps to maintain Baillie's authority to pick and choose details at will, and, especially to effect the historical transposition of the Shaw case by combining it with the repeal of the witchcraft statute.

59. See also Scott: "In one case, we are informed by Mackenzie, a poor girl was to die for witchcraft, of whom the real crime was that she had attracted too great a share, in the lady's opinion, of the attention of the laird." SCOTT, *supra* note 31, at 245.

60. "She having been speaking to one of her tormentors as present, (though invisible to the bye standers) and asking how her tormenters had got these coloured red sleeves; she suddenly gets up, takes hold of them, the company hears a shried [sic], and she pulls away two pieces of red cloth, which all the by standers beheld with amazement in her hands; nor was there any other piece of this kind of cloth to be found in the room at that occasion." HISTORY OF THE

help in both obtaining and planting the evidence. In the source, James Lindsay, a fourteen-year-old beggar boy just barely out of pupillarity (i.e., below the legal age at which testimony is generally admissible) confesses and implicates others;<sup>61</sup> Baillie exaggerates his innocence by making Wilkin, her beggar boy, wholly unable to understand what is happening to him. In the source, a witch confesses to awakening from sleep and flying across a river on her father's back, explaining that "one night her father raised her out of her bed, and they having gone to the water side, took her on his back, and carried her over the river in a flight";<sup>62</sup> in Baillie's version, Violet attracts suspicion because she appears to have crossed water dry; Baillie indicates that her father simply carried her over, but was forced to hide himself.<sup>63</sup> The most important derivation from the source involves the disposition of the corpse that closes the play. As noted above, in the Shaw case, one of the prisoners is found strangled without witnesses under mysterious circumstances. Despite the obvious possibility that despair had led to suicide, the published account concludes that since the room was locked, he must have been taken by Satan:

[B]eing left till Saturday's forenoon, he was found . . . in such a situation, that he could not have been the actor [in his strangulation] himself, [it was] concluded that some extraordinary cause had done it, especially considering that the door of the room was secured, and that there was a board set over the window, which was not there the night before when they left him.<sup>64</sup>

The "extraordinary cause" unspecified is, by implication, a *supernatural* cause.<sup>65</sup> Annabella, too, is strangled, without a reliable witness. I will return below to the possibilities afforded by the ambiguity of Annabella's death, and the problem of how an audience should adjudicate murder, suicide, and "extraordinary" causes.

The play's opening scene between Annabella and Lady Dungenen, mother of the Laird, establishes the problem involved in witchcraft as *crimen exceptum*: a supernatural phenomenon, one that by definition defies nature and the usual operations of cause and effect.

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WITCHES OF RENFREWSHIRE, *supra* note 28, at 134.

61. *Id.* at 123.

62. *Id.* at 122.

63. BAILLIE, *supra* note 44, at 88 (act 2, sc. 1).

64. HISTORY OF THE WITCHES OF RENFREWSHIRE, *supra* note 28, at 163-64.

65. As Sharpe notes, "[O]ne man, John Reid, strangled himself in prison, or as the report went, was strangled by the devil, lest, says Crauford, in his History of Renfrewshire, 'he should make a confession to the detriment of the service.'" SHARPE, *supra* note 48, at 172. Compare Scott's reference to the case of "one John Reed [sic], who hanged himself in prison, or as it was charitably said, was strangled by the devil in person, lest he should make disclosures." SCOTT, *supra* note 31, at 269.

The scene also establishes the social quality of the errors typical of witch believers:

*Annabella:* Were any strange noises heard in the chamber during the night?

*Lady Dungarren:* Ay; noises that made me start and tremble, and feel a horrid consciousness that some being or other was in the room near me, though to the natural eye invisible.

*Annabella:* What kind of sounds were they? Why did you think they were so near you?

*Lady Dungarren:* I was sitting by the table, with my head resting on my hands, when the door leading from the back staircase, which I am certain I had bolted in the evening, burst open.

*Annabella:* And what followed?

*Lady Dungarren:* I verily thought to see some elrich form or other make its appearance, and I sat for some moments rivetted to my chair, without power to move hand or foot, or almost to breathe.

*Annabella:* Yet you saw nothing?

*Lady Dungarren:* Nothing.

*Annabella:* And heard only the bursting of the door?

*Lady Dungarren:* Only that for a time. But afterwards, when I listened intently I heard strange whispering near me, and soft steps as of unshod feet, passing between me and the bed.<sup>66</sup>

This scene, like others in the play, takes the form of an interrogation, and involves a complicated dynamic between the interlocutors. While the interrogator probably influences the respondent, the witness's ability to witness is dominated by her belief that her senses are by definition inadequate in the context of witchcraft, that they must be stretched ("I listened intently") and even superseded ("a horrid consciousness"). Thus the social character of evidence gathering and the uncertainty of sensory data, two problems of knowledge established in Baillie's sources, appear on the stage from the play's beginning.

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66. BAILLIE, *supra* note 44, at 4-5 (act 1, sc. 1).



As noted above, because witchcraft was a *crimen exceptum*, women and those below pupillarity were allowed to testify. Baillie heightens the objections this practice might raise by casting the “idiot” Wilkin, son of one of the accused witches, as a primary source of evidence in the community. He incriminates his mother by mindlessly repeating the last word of his interrogator’s accusatory query, in a pattern that dramatizes Baillie’s sense of the circularity of accusation and evidence:

*Bawldy* [a servant in the Dungarren household]: Was tu on the moor i’ the nighttime, with thy mither?

*Wilkin*. Mither?

*Bawldy* Ay, was tu on the moor wi’ her, whan te thunner roared?

*Wilkin*. Thunner roared, fire roared, thunner roared! Hurl, hurl, hurl! (imitating the noise of thunder) . . .

*Bawldy*. Ay, an’ ware ye there?

*Wilkin*. Ay, there. (Nodding his head)

*Bawldy*. And wha was there beside?

*Wilkin*. Beside?

*Bawldy*. Beside thee an’ thy mither. What saw ye there?

*Wilkin*. Black [dark] man an’ fire: hurl, hurl! (Making a noise as before)

*Bawldy*. Gude saf’ us! Has tu seen the deil [devil] then, bodily?

*Wilkin*. Deil, deil!<sup>67</sup>

The leading interrogation and Wilkin’s evident obliviousness to the meaning of his statement (he generally talks only about his empty bowl and emptier stomach) challenges the use of pupil children’s testimony in witchcraft trials as in the play.

This passage reflects Baillie’s interest in both the circularity of reasoning and the corruption of procedure that witchcraft prosecution entails. These phenomena involve institutional personnel as well as community members.<sup>68</sup> What kind of “community” that is, and

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67. *Id.* at 50-52 (act 2, sc. 1).

68. Scott’s influence may be seen in the relatively low status and ignorance of Baillie’s

who causes its corruption, are somewhat ambiguous. In Baillie's source, those commissioned to prosecute by the Privy Council are all members of the nobility; in her play, however, Baillie reduces their status, hardly even treating them as members of the gentry. This could imply a simple classist politics. But a national politics with more ambiguous implications appears at the play's climax. The combination of officials and community working to an unjust end coincides with the moment when Baillie deviates from her source, folding together this case with the repeal of the law against witchcraft nearly forty years later, after all legislative power had moved to England. In Baillie's final scene, the witches about to be burned at the stake are reprieved by the announcement of the law's repeal. An officer, flanked by a company of soldiers, arrives to the sound of a trumpet and hands a paper to the Sheriff, who reads it aloud. It reads:

Be it known unto all men, that the King's Majesty, with the Lords and Commons in Parliament assembled, have decreed that the law punishing what has been called the crime of witchcraft as a felonious offence be repealed; and it is therefore repealed accordingly. Henceforth there shall no person be prosecuted at law as a wizard or witch, throughout these realms; and any person or persons who shall offer injury to any one, as being guilty of the supposed crime of witchcraft, shall be punished for such aggression. God save the king!<sup>69</sup>

The military functionary bringing the news of a law made by a faraway legislature and effective "throughout these realms" barely speaks. When the Sheriff later tells him, "Would you had authority to command the release of all my prisoners," the officer replies to this sentiment as a pure functionary would: "It is only those condemned for witchcraft, whose enlargement I have authority to command."<sup>70</sup> His fortuitous and unexplained arrival is both a melodramatic coincidence and a forceful example of the fractured state of the polity and its extreme disconnection from legislation. For in response to the announcement, villagers and officials argue that the execution can continue regardless. An undifferentiated crowd of voices clamors,

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witches and prosecutors. Scott writes, "The Supreme Court of Justiciary was that in which the cause properly and exclusively ought to have been tried. But, in practice, each inferior judge in the country, the pettiest bailie in the most trifling burgh, the smallest and most ignorant baron of a rude territory, took it on him to arrest, imprison, and examine, in which examinations, as we have already seen, the accused suffered the grossest injustice." SCOTT, *supra* note 31, at 241.

69. BAILLIE, *supra* note 44, at 157-58 (act 5, sc. 2).

70. *Id.* at 161 (act 5, sc. 2).

The dee has been better represented in the house of Parliament than a' the braid shires in the kingdom—Parliament, forsooth! We hae sent bonnie members there, indeed, gin thae be the laws they mak—And will Mary Macmurren scape after a'?—Out upon't! She may be burnt at ony rate, for she is condemned by the gude auld law of our forefathers—Ay, so she may; that stands to reason.<sup>71</sup>

This hubbub, highlighting the disconnect between custom and law that Baillie has orchestrated, concludes with a charged reference to “reason,” as the crowd decides logically that a grandfather clause should apply to the witches’ execution. While such a conflict is unsurprising in a system with so little pretense to representation, nevertheless Baillie has clearly manipulated the histories of witchcraft and of Scotland to set different modes of knowledge in unusually intense conflict and competition.

#### SOCIAL KNOWLEDGE AND SOCIAL CHANGE

The conflict among the “gude old law” against witchcraft, the proof that witches do not exist, and the repeal of the law against them, is in part an issue of customary law versus statutory reform. Similarly, the uncertain status of dueling as murder or as primitive justice becomes clear when Baillie highlights the tenuousness and subjectivity of evidence in general by staging a plot in which the testimony of a single witness is sufficient to qualify Murrey’s act as a duel rather than murder. Ordinarily, both combatants have a second in duels, to avoid relying on a single witness. At first it might seem that Baillie has provided only one witness, and then removed him, in order to emphasize the difference between uncorroborated and corroborated testimony, good and bad procedure. Because the presumption that Murrey is a murderer arises in the absence of evidence to the contrary, it can appear that Baillie’s criticism bears not only on legal *institutions* and but also on cultural *attitudes*: the cultural presumption, apparently warranted, that a violent revenge *must* have taken place, affects the prosecution here.

Baillie levels similar criticisms not only at witch-belief and witch prosecution, but also at other legal standards of evidence. In particular, she criticizes the agents of law enforcement for overvaluing concrete evidence, while omitting to question or even notice the interpretive context for that evidence, which they themselves are eagerly supplying. Baillie shows how readily characters indict their fellows, based either on material evidence, like a shred of paper or

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71. *Id.* at 158 (act 5, sc. 2).

cloth, or on circumstantial evidence. The idea that Dungarren's sister has been bewitched remains confined to the level of gossip until Annabella (taking a cue from Iago, no doubt, as well as from Baillie's source) surreptitiously tears a shred of cloth from Violet's dress and plants it in the sick child's fist, thereby creating ocular evidence that leads to Violet's arrest. In a complementary confusion, once the superstitious Lady Dungarren accepts witch-belief as a premise, she readily doubts the evidence of her own senses when she correctly identifies the handwriting in an anonymous note as Annabella's. Annabella swiftly points to three features that differentiate her writing from the script in the note—letting the audience know how she has disguised it. The judgment of various magistrates and officers of the law, whom Annabella easily dupes, proves no better.

Baillie even sacrifices the dignity of a clerical character to make her point. The university-educated minister Rutherford, at first almost alone in being skeptical of witchcraft, abruptly converts to witch-belief when he sees Violet Murrey with her supposedly dead father on a stormy night. What persuades him is the fact that he laid out the faceless corpse "with [his] own hands."<sup>72</sup> Interestingly, this example works hard to confound the material and circumstantial. Rutherford has handled the corpse himself, and has seen its dress and watch. This material evidence of identity, while compelling to him, is superficial, and, importantly, status-inflected. Having identified the corpse based partially on assumptions about who would wear such clothes, he cannot explain Murrey's presence with Violet on the moor in a violent storm except by reference to the demonic: "What is natural or unnatural, real or imaginary, who shall determine? But I have seen that which if I saw it not, the unassisted eyesight can give testimony to nothing."<sup>73</sup> The point, of course, is that unassisted eyesight cannot give material but only circumstantial evidence: culturally-influenced belief—context in short—influences the sight, and logical assessment of probabilities is useless when experience-based premises are false. The minister abandons the rational principles of disbelief in witches, principles that had made him an exception, and takes refuge with his community. The experience of his hands and eyes, facts that speak for themselves to him, easily collude with cultural prejudice, leading him to assert that Violet has been consorting with the devil.

Shapiro's discussion of the relationship between Common Sense philosophy, its reaction against epistemological skepticism, and the concept of moral certainty, helps to explain the play's invocations of

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72. *Id.* at 44 (act 1, sc. 5).

73. *Id.* at 43 (act 1, sc. 5).

the limits of human reason.<sup>74</sup> Rutherford claims not to be able to know what is natural or unnatural; seeing Violet's father made him question his ability to distinguish any order in the world. Later he must respond to an invocation of "reason" on the part of the chief baillie (that is, magistrate) justifying suspicion of Violet. The baillie argues:

Can one reasonably suppose that such a creature would be accused, or even suspected, but on the strongest proofs of guilt? Some old haggard beldame, with an ill name at any rate, might be wrongfully suspected; but Violet Murrey, good sooth! She must have been where she should not have been ere a tongue or a finger in the county would have wagged to her prejudice . . . [I]t's what every body says, for it stands to reason.<sup>75</sup>

Here the baillie clearly confounds *indicia* with reason: common knowledge is for him the same as common sense. Rutherford argues in contrast, "What is or is not in this mysterious matter, lies beyond human reason to decide . . . My heart, in despite of every proof, whispers to me she is innocent"; his acerbic view of the baillie's "reason" is "that it stands to folly would be an apter cause for every body's saying it."<sup>76</sup> Intuition rather than pure reason, that is, Common Sense in its Scottish Enlightenment meaning, echoes in the minister's response: a reflective and sympathetic individual's resistance to unreflecting community agreement.

#### TRUTH AND CONSEQUENCES

This contested invocation of reason further ties the play to certain philosophical disputes, with legal ramifications, that took place during the century between its setting and its publication. During the course of the eighteenth century, in some quarters "natural law," which had initially been associated with divine order, had simply become cognate with reason (since human reason was the means to discerning natural law).<sup>77</sup> Claiming "reasonableness" for common

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74. See *supra* note 41.

75. BAILLIE, *supra* note 44, at 103 (act 4, sc. 1).

76. *Id.* at 105 (act 4, sc. 1).

77. According to Kelly:

Throughout the eighteenth century, writers on legal subjects tended to offer a routine salute to natural law in one form or another. . . . [B]eginning with Grotius, the idea of transcendent system of values with which human law ought not to conflict was gradually dissociated from the medieval theology which had given it shape, and acquired a secular existence of its own based simply on reason. . . . [M]ost of the century's legal writers acknowledge a law of nature in terms essentially, of reason, its occasional ascription to God or a divine being seem purely perfunctory.

J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 259 (1992). Kelly asserts that the "whole conception of the 'reasonable' standard through the common law" is "a manifesta-

sense, as Rutherford does, calls attention to this issue. Though it might appear that the repeal of the witchcraft statute near the play's end means that the legal establishment will no longer support outright superstition, Baillie has by this point imbued her story with a particular kind of skepticism about the meaning of reason that makes it impossible to celebrate the triumph of what is or what poses as "rational" rather than superstitious thought.

First, statute law itself can seem too contingent to be able to constitute order. For example, ultimately the only difference between Murrey the honorable duelist and Murrey the murderer is one eyewitness, all too easily misled; that the dead man is still violently dead by the same hand highlights the contingency of being able to establish the distinction. Interestingly, Arnot cites a dissimilar dueling case that also happens to include a protagonist named Murray;<sup>78</sup> Arnot laments that there is no difference in Scottish eighteenth-century law between first- and second-degree murder: "[I]n our law there is no difference as to the crime, or the punishment of death, and confiscation of moveables, whether the killing proceeded from malice preconceived or upon sudden rencounter or chaudmell; for a slaughter being committed, it must be presumed to be done out of malice."<sup>79</sup> While this seems like further evidence of Arnot's influence, nevertheless he focuses on *mens rea*; Baillie's play devotes at least as much attention to the problem of evidence and the gap between statute and practice.

Further, the apparently reasonable substitution of natural for supernatural causation proves limited in its usefulness. Early in the play, Dungarren, identified as a university-educated rationalist, is indicted for his declared reliance on concrete evidence and its interpretation. Having seen Violet dry-shod on the far side of a stream, he immediately concludes that she must have been transported over it—but he takes this as evidence, not of magic, but of another lover. When Violet first realizes that he suspects her of infidelity, she reproves him, decrying not his inference but his stance of objectivity.

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tion of the law of nature in English dress" and concludes that "natural law may fairly claim in principle though not by name, the reasonable man of English and American law and all his works which are many." *Id.* at 267 (citing SIR FREDERICK POLLOCK, JURISPRUDENCE AND LEGAL ESSAYS 149 (1961)). Kelly adds:

[T]he notion of natural justice in the procedural sphere, . . . is applied as of course in both judicial and Quasi judicial matters and is the most explicit instance of the 'natural' standard in the common law system. Both the concept of reasonableness and the concept of natural justice, in the sense just mentioned, were much solidified in the practice of the eighteenth century English courts.

*Id.* at 267. For a detailed discussion of the refinements of natural law in the Scottish Enlightenment context, see HAAKONSEN, *supra* note 9.

78. ARNOT, *supra* note 24, at 399.

79. *Id.* at 165.

Later, Dungarren approaches Violet to ask whether she was indeed out on the moor, and, if she was there, whether it was to see her dead father. She replies:

[I]f the devil has power to assume what form he pleases, that will account for your story at once; if he has not, you have only to suppose that some silly girl, with her plaid over her head, was bewildered by the storm at her trysting place, and that will explain it sufficiently.<sup>80</sup>

Violet equivocates, offering both a superstitious and a plausible naturalistic account, neither true nor false, as the audience knows. Neither character is satisfied by this exchange; when pressed, Violet says:

*Violet.* Must I be forced to bear witness in my own behalf? There is one who should bear witness for me, and lacking that evidence, I scorn every other.

*Dungarren.* And where is that witness to be found?

*Violet.* In the heart of Dungarren.

Violet insists on the pure testimony of a lover's feeling, without supporting evidence, as the basis for judgment. This, combined with seeing her in danger of execution, eventually converts Dungarren from his rationalist position. Abandoning both dispassionate observation and the rule of law, he breaks into her prison cell to try to save her. Even if the removal of an unjust statute could be claimed as a step toward bringing positive law in line with natural, the threat of such a variance remains: human perception and the concomitant weakness of evidence remain the law's basis for enforcement.

Finally, Dungarren protests against Violet's impending execution by exclaiming, "You distract me with your formal authorities: the laws of the land and the laws of God are at variance, for she is innocent."<sup>81</sup> Dungarren thus quite clearly invokes the idea of natural law, and justifies his effort to rescue Violet on that ground. Violet also uses similar terms when she forgives her would-be executioners at the play's end: "I am condemned by what honest, though erring men, believed to be the truth. What God alone knows to be the truth, is not for man's direction."<sup>82</sup> Here what "stands to reason" has been thoroughly demoted and displaced. These individual intuitions are seemingly validated by Baillie's play as indices of truth, over

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80. BAILLIE, *supra* note 44, at 61 (act 2, sc. 2).

81. *Id.* at 125 (act 4, sc. 3).

82. *Id.* at 142 (act 5, sc. 6).

against the manners and practices that throw them into such relief. Yet what is the basis of these characters' invocations of the divine on behalf of their judgment? Dungarren's call upon God stems from no more than his lover's faith, which he has had to struggle to find, while Violet's covers her secret harboring of a killer because he is her father. Dungarren and Violet both point to the discrepancy between God's laws and men's, and the limits of men's knowledge, as the source of their trouble; the discrepancy, generated and heightened by history, is valuable in Baillie's play because it creates the conditions necessary for the insight into the limitations of "reason."

However, what is not quite acknowledged is that this critique of "reason" is equally applicable as a critique of these intuitions: arriving at and articulating such intuitions is necessarily problematized by the experience and influence of the common sort of "common sense" to which each individual is subject. Baillie's characters point emphatically to a standard of truth not only outside human institutions but also outside history; but however clearly her play invokes the need for, and posits the ground of, its idea of "moral certainty," it inevitably points to the limits of such certainty as well.

#### DRAMATIC BELIEF

Cutting across Baillie's equivocation in historical forces and legal detail, then, is her quite simple and fundamental sense of tragedy and its sources. In this vein, Baillie extends her critique of evidence both to individual consciousness and to the drama. Without an audience's capacity and willingness to judge based on insufficient evidence, no fictions of any kind, dramatic or otherwise, could work. Thus, what the play may finally attest to is a fascination with what characters, and an audience, can be made to believe—a fascination with the power of theatrical fiction.<sup>83</sup> *Witchcraft* involves the theatrical gamut: everything from the most stripped-down acting, exemplified by the importance of soliloquy, to the most elaborate sets. Within the action of the play, Grizeld Bane and Annabella have the most difficult acting jobs. Grizeld sees the devil, and a henchman of his who turns out to be her dead husband; she describes them to

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83. See WILLIAM JEWETT, *FATAL AUTONOMY: ROMANTIC DRAMA AND THE RHETORIC OF AGENCY* (1997). Jewett seeks to:

situate the period's dramatic writing in the line of practical moral reflection within which a term like 'autonomy' would ultimately attain its modern currency. . . . Drama can facilitate skeptical thinking by assigning argument to a variety of competing dramatic voices; but these voices must always be assigned to persons with bodies, real or imagined, and those bodies can always make demands on us that threaten the skeptical suspension of judgement. Problems in the representation of human agency mark the place when these two features meet.

*Id.* at 2-3.



others and speaks to them as if they were really there. The vividness of her imagination persuades other characters, who gradually accede to her visions. Baillie must hope she all but persuades the audience too; at any rate, Grizeld's fellow characters, in their response to her, model a kind of theatrical belief for the audience.

If Grizeld is assigned the task of convincing others, Annabella's repeated soliloquies involve convincing herself: she talks herself into the notion that revenge is a noble aim and that Violet must be somehow involved with the supernatural to have triumphed over her romantically. For example, Annabella argues to an empty room, "I shall but accuse her of that of which she is, perhaps, really guilty. Will this be so wicked, so unpardonable? How could a creature like this despoil such a woman as myself of the affections of Dungarren or any man, but by unholy arts?"<sup>84</sup> Dungarren is the only other soliloquizer, variously indicting Annabella's desire for him as unwomanly and questioning Violet's faith. Both Annabella and Dungarren habitually employ the rhetoric of reasoning ("if . . . then"), but they convince only themselves, arriving at new conclusions without any new basis. Together they cast doubt on any system of knowledge relying on conscience, as they show that belief can feed *itself*, perfectly groundlessly, in an impassioned mind.

Less actorly effects also highlight the problem of perception and belief. As I have noted, Violet is spotted with her father in a violent storm; her incriminating dry-shod crossing of water demands a set with a cave and stream; part of the floor of her cell must fall away when Dungarren tries to spring her from jail. All of these are manageable, but quite elaborate, stage effects. Most important is the final instance of flawed gathering and interpretation of evidence that closes the play. In the penultimate scene, just before the various exonerations, clarifications, and reveals that restore the characters to their proper identities, Annabella is eagerly poised in an inn window to view Violet's execution in the square below. Grizeld Bane unexpectedly joins her, praises her as a powerful witch ("thou art very bold. There is not a cloven foot, nor a horned head of them all, wickeder and bolder than thou art")<sup>85</sup> and claims that the Evil One has joined them in the room awaiting his prize—Violet, "if he can get her. If not, he will have some one else who is worthy to bear him company. He must have his meed and his mate: he will not return empty handed, when a fair lady is to be had."<sup>86</sup> Immediately before

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84. BAILLIE, *supra* note 44, at 75-76 (act 2, sc. 4).

85. *Id.* at 138 (act 5, sc. 1).

86. *Id.*

this exchange, Annabella has talked herself into witch-belief in order to justify her treatment of Violet:

To procure false evidence for the conviction of one whom we know or believe to be guilty,—is this a sin past redemption? No; it is but the sacrifice of truth for right and useful ends. I know it is; reason says it is; and I will be firm and bold in spite of human infirmity.<sup>87</sup>

It is quite possible that before her death, Annabella believes Satan has come for her. Thus Baillie gives us Grizeld's delusions and illustrates their influence in Annabella for a reason.

When the scene shifts to the square, and both Violet's innocence and Annabella's involvement are exposed, the stage directions call for a struggle offstage, seen through a window, and for Annabella's scarf to drift to the square. There, two stakes surrounded by piles of faggots occupy the foot of the stage. Then, finally, her dead body must be brought out to the front of the stage, "the crowd gathering round to stare at it,"<sup>88</sup> according to the stage directions. The baillie tells them to stand back, saying, "It is the Lady Annabella. She has been strangled:—she has struggled fearfully; her features are swollen and her eyes starting from her head; she has struggled fearfully—Stand back I say; retire to your places every one of you."<sup>89</sup> Annabella's body apparently remains on stage for the entire closing scene; it is referred to many lines later, after the arrival of the officer bearing the law's repeal and after much exposition of Murrey's and Grizeld Bane's circumstances.

Why does Baillie make us look at this corpse for so long? All of those confidently offering opinions on stage about Annabella's demise are characters whose judgment we have been led to question through the course of the play—even Dungarren, who demands pity for her but whose principles have been notably shifting. More importantly, posing the question of Annabella's death in any urgent way depends on the audience believing, at least for a moment, the unbelievable: that the body before them is dead. The gleefulness of this bloodthirsty gesture seems as important as the solemnity of Baillie's political and philosophical skepticism. She uses this body to remind herself and her audience that being mistaken is not just a fault to guard against but a basic element to more than one branch of human culture.

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87. *Id.* at 136 (act 5, sc. 1).

88. *Id.* at 151 (act 5, sc. 2).

89. *Id.* at 151-52 (act 5, sc.2).

Recall that right before Annabella's death two figures are vaguely seen struggling, through a window, after the scene where Grizeld Bane congratulates Annabella on her successful witchcraft and supreme evil. Grizeld is not the only one who sees Annabella as a witch; her maid, who overhears Annabella's soliloquies, believes she is not alone. When the room proves empty and Annabella alone, the maid concludes she must have been talking to spirits.<sup>90</sup> By implication then, she is, and the real evil in the play is Annabella's and others' surrender to their passions—Baillie's permanent interest held over from her earlier plays. Annabella's struggle is with herself: her death is self-destruction, enabled through witch-belief. As noted, the natural interpretation of Annabella's death, that Grizeld is the murderer, comes from characters whose credibility the play has worked to question by showing how superstition, over-reliance on circumstantial evidence, and sheer pertinacity cloud their judgment. By making us confront the spectacle of her body without directly portraying the scene of Annabella's death, the play forces the audience to confront the inadequacy of evidence as well as the horror of bearing witness; as the body lies there, line after line, the question is how the audience feels about and interprets the death. Ideally, the audience will momentarily forget to ask whether it believes a woman is dead—as of course she is not. Thus Annabella's body is a deliberate limit case of witch-belief, legal evidence, and theatrical belief, all at once.

This can be read, as noted above, as an instance of Baillie's using the rationalized Gothic, a mode of fiction in Romanticism whose most famous exponent is the novelist Ann Radcliffe. As Patricia Spacks notes, it is a critical and readerly commonplace that Radcliffe introduces supernatural horror only to explain it away. Spacks argues that one significance of Radcliffean rationalized Gothic lies in the fact that the material power of the human figures who prove the ultimate source of the supposedly supernatural horror remains real—men of high rank and no scruples have power of life and death over her heroines—yet the psychological power to generate terror and incomprehension is located in the heroine's imagination, and is thus revealed ultimately to be under the heroine's control, if she can learn to recognize and exercise that control.<sup>91</sup> In limited ways, Baillie's gestures are similar: Annabella's terror of the devil, provoked by Grizeld Bane, is a result of her own unregulated sexual desire, which has led her to consort with the witch to obtain Dungarren's

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90. *Id.* at 76 (act 2, sc. 4).

91. See PATRICIA MEYER SPACKS, *DESIRE AND TRUTH: FUNCTIONS OF PLOT IN EIGHTEENTH-CENTURY ENGLISH NOVELS* 147–74 (1990).

love; were her imagination under her moral control, Annabella, like Violet, would not be vulnerable. However Baillie's difference from Radcliffe is more important. Here, the source of the terror is different from the source of the threatening material power. No single figure, but rather the legal system and the ensemble of cultural values supporting and supported by it, constitute the source of the material power over Grizeld, Annabella, and their victims. The authority to condemn, socially and legally, is collective—no one magistrate, nor Dungarren, nor the minister, embodies it. Thus the proto-sociology of Scottish Enlightenment thought affects Baillie's take on the rationalized Gothic.

Ultimately, Baillie's treatment of the problem of evidence creates a bridge between legal, historical, and literary kinds of belief. Baillie implicitly establishes an analogy between the uncertain nature of the evidence for witchcraft and the uncertain nature of the evidence for believing in the actions and mental states of her characters, as they convince others in conversation, themselves in soliloquy, and the audience itself, of that for which there is no evidence. What emerges is a fervent acknowledgment that such justice as exists is a human artifact, and that as such its institutions and conclusions remain forever subject to question and revision.<sup>92</sup> In this Baillie is perhaps a typical Romantic dramatist, exploring theater's ability to reflect interior landscapes<sup>93</sup> enabled by insights specific to her history and position. Ever since they were first published, the true theatricality of Baillie's plays has been debated. Catherine Burroughs and others

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92. Anne K. Mellor locates in Baillie's work the notion of a "'counter' public sphere to that constructed by a masculine bourgeois Enlightenment ideology, a public sphere in which the values and concerns of women predominate." Anne K. Mellor, *Joanna Baillie and the Counter-Public Sphere*, 33 *STUD. ROMANTICISM* 559, 560 (1994). Mellor goes on to identify this sphere with literary production and consumption: "We must remember that for women in the early nineteenth century in England the very act of reading was potentially a feminist act; it implicitly asserted the rights of women to gain access to knowledge and to exercise their rational faculties on a par with men." *Id.* Mellor draws the following conclusion from Baillie's use of sympathy as a structuring part of human consciousness and judgment in her theory of theater as expressed in the *Introductory Discourse* to the first volume of her *Series of Plays*:

[Baillie's] epistemology conforms to what modern feminist philosophers have defined as "women's ways of knowing" or "stand-point theory" [in which] objectivity can be achieved, not by positing a universal subject removed from local circumstances (as assumed by Habermas and by contemporary scientists), but only by acknowledging that all knowledge producers are historically and culturally located, and by attempting to correct the inherent biases or limited standpoint of a given set of experimenters or observers.

*Id.* at 561. For the basis of Mellor's model of the "counter-public sphere," see RITA FELSKI, *BEYOND FEMINIST AESTHETICS: FEMINIST LITERATURE AND SOCIAL CHANGE* (1989).

93. "Illusion, then becomes for the Romantics more than a fascination with aesthetic experience or with the possibilities of stagecraft. The phenomena of illusion offer insight into the ambiguities of knowledge and the frail and fallible access we have to self, other, and the world." FREDERICK BURWICK, *ILLUSION AND THE DRAMA: CRITICAL THEORY OF THE ENLIGHTENMENT AND ROMANTIC ERA* 303 (1991).

have lately renewed the debate over whether Baillie's plays are truly stage-worthy or only appropriate for private reading.<sup>94</sup> Baillie's own prefaces argue doggedly for the plays' stage-worthiness and the conditions under which they could succeed—the preface to volume three of the *Plays on the Passions* goes into such material detail as size of houses, lighting, and so on. Further, in her *Introductory Discourse* to the first volume of *Plays on the Passions*, it is clear that Baillie believes the theater is the place where national, moral, and social issues can best be played out, and consensus generated:

It was the saying of a sagacious Scotchman, "Let who will make the laws of a nation, if I have the writing of its ballads." Something similar to this may be said in regard to the drama . . . . The impressions made by it are communicated at the same time, to a greater number of individuals than those made by any other species of writing, and they are strengthened in every spectator, by observing their effects upon those who surround them.<sup>95</sup>

That was Baillie's claim in the 1790s. However, by the 1830s it might have seemed that prose fiction rather than drama had become the most influential genre;<sup>96</sup> indeed, some critics have shown that the novel was in some sense colonizing the theater, as dramatic adaptations of Scott's novels proliferated.<sup>97</sup> In *Witchcraft*, Baillie uses prose rather than the pseudo-Shakespearean blank verse she had long favored. However, her play focuses on stage effects, actorly prowess, and finally the body of an actor, as if to affirm the uniqueness of the stage. Baillie, it seems, was attempting to contest the cultural dominance of the novel, and to affirm drama's unique epistemological and moral qualities—its ability to dramatize, and create, new belief.<sup>98</sup>

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94. See CATHERINE B. BURROUGHS, *CLOSET STAGES: JOANNA BAILLIE AND THE THEATER THEORY OF BRITISH ROMANTIC WOMEN WRITERS* (1997).

95. BAILLIE, *Introductory Discourse*, in *DRAMATIC AND POETIC WORKS*, *supra* note 3, at 14.

96. Ina Ferris details the contested but inexorable rise of the novel's readership and status in the Romantic period and Scott's pivotal role in lending it both popularity and authority; furthermore, she focuses on historical fictions—a category in which we might place *Witchcraft*. See INA FERRIS, *THE ACHIEVEMENT OF LITERARY AUTHORITY* (1991) (especially chapter five).

97. On adaptations of Scott novels, see Scullion, *supra* note 4. In the introductory note to a late edition, Baillie cites Scott's *Bride of Lammermoor* as a stimulus to her thinking about witch-belief. See BAILLIE, *supra* note 44, at 613.

98. Stephen Greenblatt, writing about a very different time from Baillie's when witch-belief was still an active question, argues that:

Witches, . . . imagined as real or imagined as imaginary[,] are a recurrent, even obsessive feature in Shakespeare's cultural universe. It seems that he could not let them out of his mind or rather out of his art, as if he identified the power of theater itself with the ontological liminality of witchcraft and with his own status as someone who conjured spirits created storms and wielded the power of life and death.

## THE CRITIQUE OF THE CRITIQUE

Baillie's Scottish Enlightenment intellectual milieu all but ensured her possession of a strong sense of the complex and changing nature of cultural institutions' relation to one another. This understanding might interfere with the claims she makes by implication for drama through her staging of legal change. Recall the "four stages" theory of historical change.<sup>99</sup> Scottish Enlightenment thinkers conceived of a spatio-temporal geography in which locales that co-existed at the same historical moment corresponded to different stages of development. As a result, this stadial model of history gave rise to the concept of "uneven development," a concept that was newly emerging in the period when Baillie was writing.<sup>100</sup>

By thus telescoping time between her 1697 source and the 1735 abolition of the law, Baillie emphasizes that the change of law comes from outside Scotland and meets with resistance from local culture. Yet the disunity of that culture is emphasized throughout the play. Set in Renfrewshire, the play juxtaposes two different Scottish sub-cultures: the Highlands and Islands are credited with deeply held folk beliefs about magic and second sight, while the western Lowlands, which partly participate in these beliefs, are also subject to religious and scientific influence from the east and south. The stage contains and contrasts two zones of space/time. On the one hand, Baillie describes a remote and primitive world, represented by Grizeld Bane, an old woman from Inverness (in the Highlands), who believes she is a witch, sees the devil and his henchmen, and convinces others to share her beliefs; and on the other hand, we see a modern, more enlightened world, represented by the young Earl of Dungarren, who has been away to university and is firmly skeptical about witches. Besides these references to the differences within and changes coming to Scotland, Baillie intensifies the sense of hetero-

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Stephen Greenblatt, *Shakespeare Bewitched*, in *NEW HISTORICAL LITERARY STUDY: ESSAYS ON REPRODUCING TEXTS, REPRESENTING HISTORY* 108, 120 (Jeffrey N. Cox & Larry J. Reynolds eds. 1993). It is perhaps also worth noting that Scott's epithet was "The Wizard of the North."

99. See LIEBERMAN, *supra* note 8, at 149.

100. According to James Chandler,

The crucial element in this new Scottish-Enlightenment sense of history . . . is a dialectical sense of periodization in which particular 'societies' or 'nations,' newly theorized as such by just these writers, are recognized as existing in 'states' that belong at once to two different, and to some extent competing, orders of temporality. . . . When this scheme is appropriated by . . . Hegel, the larger order is understood to have its own developmental sequence, but this is not necessarily so for the Scottish Enlightenment writers and their later disciples. In the Scottish Enlightenment accounts, the emphasis is not on the universal progress of spirit but rather on measurement, comparison, and explanation.

CHANDLER, *supra* note 14, at 128.

geneousness of Scottish culture by populating her play with various other figures, including an Episcopalian lady's maid from Barra, with ideas and speech above her station, and a Highland herdsman whose claims to have "seen bogles enow"<sup>101</sup> persuade locals to accord him more right than anyone local to believe in witches. Clearly, there is no single Scottish "culture" here to demonstrate its backwardness, its progress, its authenticity or its assimilation, but a complex and even fractured geographical, linguistic, and customary entity.

The officer, with a company of soldiers, carrying a law made elsewhere onto the stage, and greeted by a discordant and resistant crowd, constitutes one of the signal changes Baillie makes between her source and her play. This alteration is her most emphatic gesture to dramatize the disunity of Great Britain and to showcase Scotland itself as a spectacular case of uneven development. If her insistence on the interrelationship of legal institutions with cultural practices also follows from her Scottish Enlightenment intellectual milieu, it then makes sense that her sense of the uncertainty, the risk involved in all legal interpretation of evidence, all conviction, stems from an acknowledgment that the "perfection" Kames referred to was an ongoing process—and not the achieved state, the "maturity" of the Scottish criminal law averred by the followers of Baron Hume.

Indeed, Baillie exploits for dramatic effect Scotland's emerging status as *the* place of uneven development.<sup>102</sup> More than a topic in and of itself, the problem of Scottish national identity provides Baillie a means for her examination of broader questions. Baillie uses the period's established association of Scotland with cultural conflict, and Scottish Enlightenment tools developed in and designed for the analysis of that conflict, to explore the moral, epistemological, and dramaturgical issues involving testimony, evidence, trust, and fear that engage her.<sup>103</sup> Though the different nationalist-inflected histories of Scottish law may in part have shaped her subject matter and approach, Baillie's play most effectively explores the uncomfortable lack of "perfection" in the relationship between law and culture. The result may be that the very confluence of historical and intellectual events that gave Baillie her insights by definition makes it impossible that she or her audience can truly transcend them.

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101. BAILLIE, *supra* note 44, at 35-36 (act 1, sc. 4).

102. Chandler, along with other critics such as Ina Ferris and Katie Trumpener, notes Scott's agency in thematizing the relationship between England and Scotland, and between Highlands and Lowlands within Scotland, as one of uneven development. See CHANDLER, *supra* note 14, at 127-47; see also FERRIS, *supra* note 96; KATIE TRUMPENER, *BARDIC NATIONALISM: THE ROMANTIC NOVEL AND THE BRITISH EMPIRE* (1997).

103. On the general importance of the Scottish Enlightenment to discourses of knowledge, see also MARY POOVEY, *A HISTORY OF THE MODERN FACT: PROBLEMS OF KNOWLEDGE IN THE SCIENCES OF WEALTH AND SOCIETY* 214-306 (1998).

Baillie's play arguably engages in the cultural study of law, analyzing the reciprocal influence of legal and other cultural discourses.<sup>104</sup> In her play, watching the succession of one kind of belief to another makes us look at all the grounds of belief anew. Yet the stronger the analogy between problems of evidence in law and problems of evidence in drama, and the more clearly their reciprocal influence is demonstrated, the weaker the case for literature as a place *outside* from which to engage these issues.<sup>105</sup> Like Dungarren and Violet appealing to God's law while following their own hearts, Baillie gestures toward an outside source of truth with which to critique flawed legal institutions and to question the method and direction of their supposed progress and perfection—but it is an outside source whose ultimate inaccessibility she simultaneously has proved. Regarding Annabella's equivocal corpse, the obdurate emblem of unanswered questions about the circumstances of her death and about its representation, Baillie's characters, and in a different manner her audience, must confront both a renewed and reinforced sense of the imperfection of their knowledge and, at the same time, the impulse, and the need, nevertheless to judge.

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104. According to Binder and Weisberg, "The best cultural studies of law reveal how policy decisions may reshape the expressive possibilities and social identities available to individuals, thereby conditioning the preferences considered by conventional policy analysis." Binder and Weisberg recommend "a legal scholarship that explores and enhances the expressive and compositional power of legal thought and practice in the specific political and economic worlds in which they operate . . . [:] a scholarship [that] recognizes the literary as a constitutive dimension of law rather than a redemptive supplement." GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* 19 (2000).

105. Binder and Weisberg propose similar ideas relative to understanding the law, perhaps with an echo of Kames:

Much critical scholarship in law accepts the premise that law should mimic social will but then argues that law either does not or cannot do so. . . . [However, a] more sophisticated and less fragile criticism recognizes that social will is not independent of legal representation. . . . Thus, the legal representation of social will bears little resemblance to scientific observation. It is more like the literary representation of generic themes such as 'the pastoral' and 'the sublime'. . . . These representations are judged aesthetically rather than epistemologically: They are judged according to the experience they enable rather than their truth to experience. So too we can judge law aesthetically, according to the society it forms, the identities it defines, the preferences it encourages and the subjective experience it enables.

Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 *STAN. L. REV.* 1149, 1151-52 (1997).



